

General Information Letter: Nexus determinations cannot generally be made by letter ruling.

December 22, 2003

Dear:

A copy of your September 17, 2003 letter has been forwarded to me so that I can address your questions relating to Illinois corporate income taxes and Illinois wage withholding requirements. In your letter, you state the following:

We are requesting information regarding the point at which a Nebraska-based entity is required to register with your state to:

- Collect and remit sales tax from customers
- File a corporate income tax return with your state
- Report wages to your state and withhold income taxes for those employees who work in your state a limited number of days each year

The entity provides services for a fee to businesses. It will have less than ten clients in your state and will not have an office in your state. It does not engage in any type of broad solicitations within your state. Employees of the entity will travel to and work in your state for a total of approximately ten days per year. While in your state, they will provide services to their clients which will be principally related to review and approval of ideas and sample products which were prepared in Nebraska. The majority of the time spent working on client matters will be done in Nebraska. Any resulting taxable products will be shipped into your state to clients' locations via non-related companies such as COMPANY1 and COMPANY2.

In the above example, is the entity required to register with your state and collect the above taxes?

In the above example, if everything is the same except that no one travels to your state, is the entity required to register with your state and collect the above taxes?

As mentioned above, this letter will address your second and third questions that relate to Illinois corporate income taxes and Illinois wage withholdings. According to the Department of Revenue ("Department") regulations, the Department may issue only two types of letter rulings: Private Letter Rulings ("PLR") and General Information Letters ("GIL"). The regulations explaining these two types of rulings issued by the Department can be found in 2 Ill. Adm. Code §1200, or on the website <http://www.revenue.state.il.us/legalinformation/regs/part1200>.

Due to the nature of your inquiry and the information presented in your letter, we are required to respond with a GIL. GILs are designed to provide background information on specific topics. GILs, however, are not binding on the Department.

With respect to your question regarding whether or not your client must file corporate returns with Illinois, Section 502(a) of the Illinois Income Tax Act ("IITA," 35 ILCS 5/101 et seq.) describes when an Illinois income tax return is required. Pursuant to Section 502(a), an Illinois income tax return is required in two situations. The first situation is when a taxpayer is liable for Illinois income tax. The second situation is, in the case of a corporation qualified to do business in Illinois, when the taxpayer

is required to file a federal income tax return, regardless of whether such person is liable for Illinois income tax.

Section 201 of the Illinois Income Tax Act ("IITA"), 35 ILCS 5/101 et seq, imposes a tax measured by net income on corporations for the privilege of earning or receiving income in this State. The Due Process and Commerce Clauses of the Federal Constitution limit the power of States to subject foreign corporations to tax. The Due Process Clause requires that there exist some minimum connection between a state and the person, property, or transaction it seeks to tax (Quill Corp. v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904 (1992)). Similarly, the Commerce Clause requires that the tax be applied to an activity with a substantial nexus with the taxing state. Id.

Whether the entity is liable for Illinois income taxes depends on whether there is sufficient nexus between Illinois and the entity. The question of nexus is highly fact-dependent. Therefore, the Department does not issue rulings regarding whether a taxpayer has nexus with the State. Such a determination can only be made in the context of an audit where a Department auditor has access to all relevant facts and circumstances.

Your letter indicates that employees of the entity at issue travel to and work in Illinois for approximately ten days per year. Please note that courts have determined that occasional visits to another state would probably satisfy the commerce and due process clauses. For example, in the New York case of Orvis v. Tax Appeals Tribunal, 86 N.Y.2d 165, 654 N.E.2d 954 (1995), the court found that four visits to nineteen customers in one year was enough to allow the state to tax a Vermont wholesaler.

Your letter asks whether the entity is required to register with Illinois. Businesses with Illinois customers must register with the state of Illinois. All inquiries regarding how to register as a foreign corporation should be directed to the Illinois Secretary of State at the following address:

Office of the Illinois Secretary of State  
Department of Business Services  
Howlett Building, Room 328  
Springfield, Illinois 62756  
(217) 782-7880

Please note that registration with the Illinois Department of Revenue is also required for foreign businesses with Illinois customers. Enclosed please find a copy of Form REG-1, which is used to register businesses with the Illinois Department of Revenue.

Article 7 of the Illinois Income Tax Act ("IITA," 35 ILCS 5/101 et seq) discusses withholding tax. Section 701 of the IITA requires every employer transacting business within Illinois to withhold tax on compensation paid in Illinois. Section 304(a)(2)(B) states that compensation is paid in this state if:

- (i) The individual's service is performed entirely within this State;
- (ii) The individual's service is performed both within and without this State, but the service performed without this State is incidental to the individual's service performed within this State; or

- (iii) Some of the service is performed within this State and either the base of operations, or if there is no base of operations, the place from which the service is directed or controlled is within this State, or the base of operations or the place from which the service is directed or controlled is not in any state in which some part of the service is performed, but the individual's residence is in this State.

We are unable to determine whether the entity is required to withhold tax based on the information you have provided. If it is determined that the compensation provided by the entity to its employees is "paid in Illinois," then the entity is required to withhold Illinois taxes from its employees.

It is my understanding that you have already received a response from the Sales Tax Division regarding your questions relating to the collection and remittance of sales tax. Should you have additional questions relating to corporate income tax returns or wage withholding, please do not hesitate to contact me at your convenience.

As stated above, this is a general information letter which does not constitute a statement of policy that either applies, interprets or prescribes tax law. It is not binding on the Department.

Sincerely,

Heidi S. Scott  
Staff Attorney – Income Tax